RAMACHANDRAN MEYAPPAN & ORS v. CHELLAPAN K KALIMUTHU & ORS

HIGH COURT MALAYA, SHAH ALAM
WONG KIAN KHEONG J
[CIVIL SUIT NO: BA-21NCVC-93-11-2018]
13 FEBRUARY 2019

CIVIL PROCEDURE: *Injunction – Interlocutory injunction – Application to restrain fifth defendant from entering land to demolish temple – Whether fifth defendant registered owner of land temple erected on – Whether fifth defendant had rights under ss. 92(1), 2(a) t0 (d) and 340 (1) of National Land Code – Whether there was reasonable cause of action against fifth defendant – Whether court could accept averments in statement of claim regarding fraud, illegality, impropriety and alleged conspiracy – Whether s. 44 of Evidence Act 1950 could be relied on as cause of action to impugn fifth defendant – Whether Hindu custom had force of law – Federal Constitution, arts. 13(1), 160(2) – Whether filing of suit complied with s. 9(c) of Societies Act 1966 – Whether doctrine of res judicata applied – Whether allowing suit to proceed an abuse of court process*

CIVIL PROCEDURE: *Stay – Stay of execution – Application for – Application to stay all proceedings in suit pending intervention by Attorney General ('AG') to settle amicably all matters regarding temple – Special circumstances – Whether arose – Whether intervention of AG constituted special circumstances to stay suit – Whether allowing stay would occasion injustice – Whether court has threefold duty to ensure just, expeditious and economical disposal of cases – Rules of Court 2012, O. 34 r. 1(1)(b)*

CIVIL PROCEDURE: *Striking out – Application for – Application to strike out plaintiffs' suit – Whether plaintiffs' suit complied with s. 9(c) of Societies Act 1966 – Whether suit barred by doctrine of res judicata – Whether there was reasonable cause of action – Whether allowing suit to proceed an abuse of court process – Whether striking out application allowed*

This suit concerned the Sri Maha Mariamman Temple ('temple') which was erected on part of a piece of land ('the land'). The plaintiffs, who were devotees of the temple, filed this action ('this suit') on behalf of themselves. The plaintiffs claimed there was conspiracy between the first and fifth defendants to, among others, demolish the temple and obtain vacant possession of the land by fraud, unlawful and/or improper means ('alleged conspiracy'). Pursuant to the alleged conspiracy, a consent judgment was recorded and the first and fifth defendants had entered into an agreement to relocate the temple. According to the plaintiffs, the first defendant had breached his duties owed to him as a trustee and fiduciary to the temple and had filed false documents and accounts on behalf of the management body with the Registrar of Societies ('ROS'). The plaintiffs also claimed for a

declaration that the consent judgment was invalid and should be set aside under s. 44 of the Evidence Act 1950 ('EA'). In this suit, the plaintiffs applied for, among others, (i) an interlocutory injunction to restrain the fifth defendant from entering the land to demolish the temple; and (ii) an order to stay the execution of a writ of possession ('WP') obtained by the fifth defendant ('encl. 4'). Three applications had been filed to strike out this suit (i) an application by the fifth defendant ('encl. 20'); (ii) an application by the second defendant ('encl. 26'); and (iii) an application by the third and fourth defendants ('encl. 31'). The plaintiffs filed an application ('encl. 52') to stay all proceedings in this suit pending the intervention by the Attorney General ('AG') to settle amicably all matters regarding the temple. The second defendant opposed encl. 52 and insisted on proceeding with encl. 26. The plaintiffs, however, contended that encl. 52 should be allowed on the following grounds (i) that the first, third to fifth and sixth defendants did not object to encl. 52; (ii) the second defendant was only a nominal party in this suit; and (iii) the second defendant would not be prejudiced by a stay order.

Held (dismissing encls. 4 & 52; allowing defendants' applications to strike out suit):

(1) The plaintiff failed to discharge the onus to satisfy this court that there existed special circumstances in this case to justify a stay order. The AG's intervention did not constitute a special circumstance to stay this suit because this suit concerned the land which was registered in the name of the fifth defendant. The fifth defendant's ownership and rights over the land had been conferred by ss. 92(1), (2)(a) to (c) and 340(1) of the National Land Code ('NLC'). Indeed, such proprietary rights of the fifth defendant in the land were guaranteed by art. 13(1) of the Federal Constitution ('Constitution'). Under the NLC, and any other written law, the AG had no power over the land. (para 17)

(2) The fifth defendant's undertaking had been given and since then, the fifth defendant had unilaterally undertaken to this court not to enforce the consent judgment and the WP pending the disposal of encl. 4. The fifth defendant wished to proceed with encls. 4 and 20. If encl. 52 was allowed, this would occasion an injustice to the fifth defendant. Further, under O. 34 r. 1(1)(b) of the Rules of Court 2012 ('RC'), the court has a threefold duty to ensure a just, expeditious and economical disposal of cases. To allow encl. 52 would mean that this suit would not be expeditiously disposed of as required by the said O. 34. (para 17)

(3) The fifth defendant was the registered owner of the land and had rights under ss. 92(1), 2(a) to (d) and 340(1) of the NLC. In this suit, the statement of claim ('SOC') did not allege any of the vitiating circumstances in s. 340(2)(a), (b) and (c) of the NLC which would render

defeasible the fifth defendant's registered title to the land. Accordingly, the SOC did not disclose any reasonable cause of action against the fifth defendant regarding the land within the meaning of para (a). By reason of s. 341 of the NLC, the management body, the plaintiffs and any of the devotees could not acquire any proprietary right in the land solely by reason of their occupation of the land. The plaintiffs could not rely on the alleged State Exco's decision that the temple would remain on the land because the fifth defendant's registered title was conclusive under s. 89(1) of the NLC. This court could not accept the averments in the SOC regarding fraud, illegality, impropriety and alleged conspiracy against the fifth defendant because the fifth defendant was entitled to exercise any one of all of the statutory rights regarding the land as conferred by ss. 92(1), (2)(a) to (d) and 340(1) of the NLC. (paras 23-27)

(4) Section 44 of the EA did not concern land, let alone proprietary rights in land. Hence, s. 44 of the EA did not confer any right on the plaintiffs to render defeasible the fifth defendant's registered title. In other words, the plaintiffs could not rely on s. 44 of the EA as a cause of action to impugn the fifth defendant's registered title. Further, this court was constrained to reject any reliance on Hindu customs at the expense of the NLC. According to the definition of 'law' in art. 160(2) of the Constitution, a custom or usage could only be enforced if it could be shown that the custom or usage had the 'force of law.' There was no proof that Hindu customs had the force of law in this case. In any event, any custom or usage could not override the codified provisions of the NLC regarding the rights of a registered proprietor of land which were guaranteed under art. 13(1) of the Constitution. It was thus plain and obvious that the SOC did not disclose any reasonable cause of action against the fifth defendant within the meaning of para (a). On this ground alone, encl. 20 should be allowed (paras 28, 29 & 31)

(5) The filing of this suit by the plaintiffs did not comply with s. 9(c) of the Societies Act 1966 ('SA'), which was a mandatory provision because the Legislature had employed the use of the mandatory term 'shall' in the opening sentence of s. 9 of the SA. If s. 9 (c) of the SA was not mandatory, this would open the floodgates of litigation to any member of any registered society to sue on behalf of the registered society on any matter regarding the registered society. Such an interpretation was also contrary to good governance on the part of registered societies, namely any action to be filed by a registered society should be instituted in the name of the public officer declared to the ROS and was registered with the ROS for the purpose regarding suits under s. 9(c) of the SA. As this suit had breached s. 9(c) of the SA, on this ground, the three applications should be allowed. (para 37)

(6) This suit had been filed by the privies of the defendants (2001 suit). Accordingly, this suit was barred by both limbs of the *res judicata* doctrine. To allow this suit to proceed was not only an abuse of court process but was contumelious in the sense of allowing the defendants (2001 suit) and their privies to continue to breach the consent judgment and the decision (2001 suit). As the plaintiffs had no cause of action against the fifth defendant, encl. 4 was dismissed. To grant an order in terms of encl.4 was to allow the continuous breach of two court orders. (paras 44 & 47)

Case(s) referred to:

AmBank (M) Bhd v. Metal Reclamation (Industries) Sdn Bhd & Ors [2016] 10 CLJ 205 HC ***(refd)***

Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Celcom Malaysia Bhd & Anor v. Tan Sri Dato' Tajudin Ramli & Ors [2017] 7 CLJ 488 ***(refd)***

Doretti Resources Sdn Bhd v. Fitters Marketing Sdn Bhd & Ors And Another Case [2017] 1 LNS 738 HC ***(refd)***

Gleeson v. J Wippell & Co Ltd [1977] 1 WLR 510 ***(refd)***

Ibrahim Ismail & Anor v. Hasnah Puteh Imat & Anor And Another Appeal [2004] 1 CLJ 797 CA ***(refd)***

Kapten Lam Chee Keong & Ors v. Malaysian Airline System Bhd [2015] 4 CLJ 1089 HC ***(refd)***

Khoo Soo Teong v. Khoo Siew Ghim & Anor [1991] 3 CLJ 2063; [1991] 1 CLJ (Rep) 212 SC ***(refd)***

Pacific Bunkers Pte Ltd v. Owners Of The Ships Or Vessels "Geniki Sarawak" And "Geniki Johor" & Another Case (No 1) [2015] 7 CLJ 1071 HC ***(refd)***

Sagong Tasi & Ors v. Kerajaan Negeri Selangor & Ors [2002] 2 CLJ 543 HC ***(refd)***

See Thong & Anor v. Saw Beng Chong [2012] 1 LNS 817 CA ***(refd)***

Sidek Hj Muhamad & Ors v. The Government Of The State of Perak & Ors [1982] CLJ 244; [1982] CLJ (Rep) 321 FC ***(refd)***

Tuan Haji Ishak Ismail v. Leong Hup Holdings Bhd & Other Appeals [1996] 1 CLJ 393 CA ***(refd)***

WTWT Sdn Bhd v. Chew Bros (Malaysia) Sdn Bhd & Ors [2015] 2 CLJ 426 HC ***(refd)***

Yeng Hing Enterprise Sdn Bhd v. Liow Su Fah [1979] 1 LNS 130 FC ***(refd)***

Legislation referred to:

Evidence Act 1950, s. 44

Federal Constitution, arts. 11(1), (3)(a), (b), (c), 13(1), 160(2)

Land Acquisition Act 1960, ss. 2(1), 3(1)(a), (b), (c)

National Land Code, ss. 5, 16(2), 89(a), 92(1), (2)(a), (b), (c), 340(1), (2)(a), (b), (c), 341

Rules of Court 2012, O. 18 r. 19(1)(a), (b), (c), (d), (2), O. 32 r. 4(1), O. 34 r. 1(1)(b), O. 59 r. 16(4), O. 92 r. 4

Societies Act 1966, ss. 2, 7(1), 9(c)

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For the 1st defendant - Kirubakaran Karthigasu & Tom Lim Yap Thong; M/s Shui Tai
For the 2nd defendant - Megat Abdul Munir & Muhammad Asyraf Abdul Aziz; M/s Zain Megat & Murad
For the 3rd & 4th defendants - Nik Haizie Azlin Nabidin; SFC
For the 5th defendant - Claudia Cheah Pek Yee & Brenda Chan Qing Wen; M/s Skrine

Reported by Suhainah Wahiduddin

JUDGMENT

(Court encl. nos. 4, 20, 26, 31 and 52)

Wong Kian Kheong J:

Introduction

[1] This suit concerns Sri Maha Mariamman Temple (temple) which is erected on part of a piece of land held under Grant No. 284076 Lot No. 81278, Mukim Damansara, Petaling District, Selangor (land).

[2] The above-named ten plaintiffs filed this action (this suit) on behalf of themselves and as representatives for 40 other plaintiffs named in Appendix A to the writ of this suit (plaintiffs).

[3] The parties in this suit, according to the statement of claim (SOC), are as follows:

(i) the plaintiffs are the devotees of the temple;

(ii) the first defendant (first defendant) is the purported Chairman of the management body of the temple (management body);

(iii) the second defendant company (second defendant), a developer of real property, is the previous registered proprietor of the land;

(iv) the third defendant (third defendant) is the Selangor State Director of Town and Country Planning;

(v) the fourth defendant (fourth defendant) is the Selangor State Government. It is to be noted under s. 16(2) of the National Land Code (NLC), any action "relating to land in which it is sought to establish any liability" on the part of the "State Authority" (defined in s. 5 NLC) of Selangor "shall" be brought against the Selangor State Director of Lands and Mines. The learned Senior Federal Counsel (who appeared for the fourth defendant) did not raise any objection regarding the breach of s. 16(2) NLC and consequently, such a breach is immaterial – please see Mohd. Noor J's (as he then was) judgment in the High Court in *Sagong Tasi & Ors v. Kerajaan Negeri Selangor & Ors* [2002] 2 CLJ 543; [2002] 2 MLJ 591, at 599-601;

(vi) the fifth defendant company (fifth defendant) is the present registered owner of the land;

(vii) the sixth defendant (sixth defendant), deceased, is the previous trustee of the temple and a party to the consent judgment pronounced on 11 March 2014 by Wan Arfah binti Wan Ibrahim J (consent judgment (11 March 2014)) in Shah Alam High Court Civil Suit No. MT1-21-353-1996 (1996 Suit); and

(viii) the seventh (seventh defendant) was the former head of a "temporary committee" which previously managed the temple.

[4] In this suit, the plaintiffs claim as follows, among others:

(i) the temple was built in the 1880's by the plaintiffs' ancestors when they worked for the "Seafield Rubber Estate";

(ii) on 16 August 2005, the Selangor State Executive Committee (State EXCO) had "confirmed" that the temple would remain on the land (alleged State EXCO's decision);

(iii) there was a conspiracy between the first and fifth defendants to, among others, demolish the temple and obtain vacant possession of the land by fraud, unlawful and/or improper means (alleged conspiracy). Pursuant to the alleged conspiracy, among others:

(a) the consent judgment (11 March 2014) was recorded; and

(b) the first and fifth defendants had entered into an agreement dated 8 October 2016 to, among others, relocate the temple (agreement (8 October 2016));

(iv) the first defendant had:

(a) breached his duties owed by him as a trustee and fiduciary to the temple; and

(b) filed false documents and accounts on behalf of the management body with the Registrar of Societies (ROS);

(v) the consent judgment (11 March 2014) is invalid and should be set aside pursuant to s. 44 of the Evidence Act 1950 (EA);

(vi) the consent judgment (11 March 2014) has been breached by:

(a) the fifth defendant; and

(b) the third and fourth defendants when "Site A" (the location described in Annex A1 to the consent judgment (11 March 2014) to which the temple is to be built and relocated) has not been gazetted as a place of worship;

(vii) reliance was placed on Hindu customary law and legitimate expectation of the temple's devotees (devotees); and

(viii) the following remedies, among others, have been sought:

(a) an interlocutory injunction to restrain the fifth defendant from approaching the temple for the purpose of its demolition until the disposal of this suit;

(b) an order to stay the execution of a writ of possession dated 14 November 2017 obtained by the fifth defendant (WP);

(c) a declaration that the consent judgment (11 March 2014) is invalid and should be set aside under s. 44 EA;

(d) a declaration that all the above-named defendants or any two or more of them together with other persons have conspired in the alleged conspiracy. In the alternative, a declaration that:

(1) the first and fifth defendants have committed fraud and/or the alleged conspiracy; or

(2) the first defendant has dishonestly assisted or abetted the fifth defendant to achieve the objectives of the alleged conspiracy; and

(e) an order that the first and fifth defendants indemnify the plaintiffs in respect of the costs of this suit.

How This Court Heard This Suit?

[5] Gunalan a/l Muniandy J and I have been tasked to hear all cases registered in the Shah Alam High Court from 1 October 2018 until 31 December 2018 (period).

[6] This suit was initially registered in Gunalan J's court. However on 29 November 2018, Gunalan J recused himself from hearing this suit as His Lordship had decided another case which was related to this suit. Hence, this case is heard by me as the other judge to hear all cases filed during the period.

[7] When learned counsel for all the parties first appeared before me, I informed them of Gunalan J's recusal and consequently, the transfer of this suit to my court. I then inquired from all learned counsel as to whether their clients had any objection to me hearing this suit. Learned counsel for all parties had placed on record that all the parties had no objection to this court hearing this suit.

Plaintiffs' Interlocutory Injunction Application

[8] In this suit, the plaintiffs have applied for the following orders, among others (encl. 4):

(i) an interlocutory injunction to restrain the fifth defendant from entering the land to demolish the temple; and

(ii) an order to stay the execution of the WP

– until the disposal of this suit.

[9] Enclosure 4 had been filed with a certificate of urgency. On the first day of the hearing of encl. 4, the plaintiffs' learned counsel applied for an *ad interim* interlocutory injunction as per the terms of encl. 4 pending the disposal of encl. 4 (*ad interim* interlocutory injunction application). Before I proceeded to hear the *ad interim* interlocutory injunction application, the fifth defendant's learned counsel magnanimously informed the court that the fifth defendant would give an undertaking to court whereby the fifth defendant would not enforce the consent judgment (11 March 2014) and the WP pending the disposal of encl. 4 (fifth defendant's undertaking). The fifth defendant's undertaking was given provided that the plaintiff would give a cross-undertaking to pay damages for any loss which would be suffered by the fifth defendant arising from the delay in enforcing the consent judgment (11 March 2014) and the WP:

(i) if encl. 4 is subsequently dismissed; or

(ii) if the trial of this suit is decided in favour of the fifth defendant

(plaintiffs' undertaking).

[10] The fifth defendant's undertaking and the plaintiff's undertaking had been given to this court pending the disposal of encl. 4.

Three Striking Out Applications

[11] The following three applications have been filed to strike out this suit:

(i) an application by the fifth defendant (encl. 20);

(ii) an application by the second defendant (encl. 26); and

(iii) an application by the third and fourth defendants (enc. 31).

Stay Application

[12] The plaintiffs have filed an application (encl. 52) to stay all proceedings in this suit pending the "intervention" by the Honourable Attorney General (AG) to settle amicably all matters regarding the temple (AG's intervention).

Judicial Approach

[13] Enclosures 4, 20, 26 and 31 had been scheduled to be heard on 22 January 2019.

[14] On 22 January 2019, the second defendant had opposed encl. 52 and insisted on proceeding with encl. 26. The first and third to fifth defendants did not object to encl. 52 but they insisted that encls. 4, 20, 26 and 31 should be disposed of. In view of the filing of encl. 52:

(i) I exercised my discretion under O. 32 r. 4(1) of the Rules of Court 2012 (RC) to postpone the hearing of encls. 4, 20, 26 and 31 from 22 January 2019 to 13 February 2019. If I had proceeded to hear the second defendant's application to strike out this suit on 22 January 2019, this would have caused an injustice to the plaintiffs by rendering encl. 52 redundant; and

(ii) I fixed the hearing and disposal of encls. 4, 20, 26, 31 and 52 on 13 February 2019 in the following order:

(a) Enclosure 52;

(b) Enclosures 20, 26 and 31; and

(c) Enclosure 4.

Enclosure 52

[15] In *Pacific Bunkers Pte Ltd v. Owners Of The Ships Or Vessels "Geniki Sarawak" And "Geniki Johor" & Another Case (No. 1)* [2015] 7 CLJ 1071; [2015] 2 AMR 887 and *Ambank (M) Bhd v. Metal Reclamation (Industries) Sdn Bhd & Ors* [2016] 10 CLJ 205, I have expressed the following:

(i) the court has a discretionary power under O. 92 r. 4 RC and/or its inherent jurisdiction to stay the proceedings of a case pending the outcome of a certain event (stay order); and

(ii) an applicant for a stay order has the burden to satisfy the court of the following two matters (two conditions):

(a) there exists special circumstances to justify the stay order (first condition); and

(b) if the stay order is not granted, there will be an:

(i) injustice to any party; or

(ii) abuse of court process

(second condition).

The appeals to the Court of Appeal against both the above decisions have been dismissed.

[16] The plaintiffs have contended that encl. 52 should be allowed on the following grounds:

A (i) the first, third to fifth and sixth defendants did not object to encl. 52;

(ii) the second defendant is only a nominal party in this suit; and

(iii) the second defendant would not be prejudiced by a stay order.

B **[17]** I exercise my discretion not to allow encl. 52 for the following reasons:

(i) the plaintiffs have failed to discharge the onus to satisfy this court that there exists special circumstances in this case to justify a stay order. Hence, the non-fulfillment of the first condition. The AG's intervention does not constitute a special circumstance to stay this suit because:

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(a) This suit concerns the land which is registered in the name of the fifth defendant. The fifth defendant's ownership and rights over the land have been conferred by ss. 92(1), (2)(a) to (c) and 340(1) NLC. Indeed, such proprietary rights of the fifth defendant in the land are guaranteed by art. 13(1) of the Federal Constitution (Constitution);

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(b) under the NLC and any other written law, the AG has no power over the land or any "alienated land" (defined in s. 5 NLC) for that matter; and

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(c) the power to acquire "land" under s. 3(1)(a) to (c) of the Land Acquisition Act 1960 (LAA) is vested in the "State Authority" (defined in s. 2(1) LAA to mean the "Ruler or the Yang di-Pertua Negeri of the State, as the case may require"). Section 2(1) LAA defines "land" to include "alienated land" such as the land in this case. The AG has no power to acquire the land pursuant to s. 3(1)(a) to (c) LAA; and/or

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(ii) the second condition is not satisfied in this case as follows:

(a) the fifth defendant's undertaking had been given on 29 November 2018. Since then, the fifth defendant has unilaterally undertaken to this court not to enforce the consent judgment (11 March 2014) and the WP pending the disposal of encl. 4. The fifth defendant now wishes to proceed with encls. 4 and 20. If encl. 52 is allowed, this will occasion an injustice to the fifth defendant; and/or

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(b) under O. 34 r. 1(1)(b) RC, the court has a three-fold duty to ensure a just, expeditious and economical disposal of cases – please see *Celcom Malaysia Bhd & Anor v. Tan Sri Dato' Tajudin bin Ramli & Ors* [2017] 7 CLJ 488; [2018] 10 MLJ 397, at paras. 19 and 20.

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The hearing of encls. 4, 20, 26 and 31 have been postponed from 22 January 2019 to 13 February 2019. Up to the date of this written judgment, the AG has not intervened in this suit. Furthermore, there

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is no inkling whether AG's intervention will ever be made in this case. The court should not stay a case pending the outcome of an uncertain event. To allow encl. 52 will mean that this suit will not be expeditiously disposed of as required by O. 34 r. 1(1)(b) RC.

[18] I am not able to accept the plaintiffs' submission that:

(i) the first, third to fifth and sixth defendants have not objected to encl. 52; and

(ii) the second defendant is only a nominal party in this suit and there is therefore no prejudice to the second defendant

because the plaintiffs bear the legal burden to satisfy the two conditions and such a burden cannot be discharged by the above facts. In other words, even if all the parties in the proceedings agree to a stay order but if the two conditions are not cumulatively fulfilled, the court is duty bound to decline to make the stay order.

[19] In view of the reasons explained in the above paras. 17 and 18, encl. 52 is dismissed with costs to be paid by the plaintiffs to the second defendant.

Enclosure 20, 26 And 31 (Three Applications)

[20] In deciding the three applications, it is trite law that:

(i) to strike out this suit on the ground that the SOC does not disclose a reasonable cause of action under O. 18 r. 19(1)(a) RC (para. (a)):

(a) according to O. 18 r. 19(2) RC, the Court cannot consider affidavit evidence – please see the Court of Appeal's judgment delivered by Ramly Ali JCA (as he then was) in *See Thong & Anor v. Saw Beng Chong* [2012] 1 LNS 817; [2013] 3 MLJ 235, at paras. 9 and 10; and

(b) the court will assume that the contents of the SOC are true – please refer to the Court of Appeal's judgment given by Mahadev Shankar JCA in *Tuan Haji Ishak Ismail v. Leong Hup Holdings Bhd & Other Appeals* [1996] 1 CLJ 393; [1996] 1 MLJ 661, at 679;

(ii) the court may consider affidavits filed by the relevant parties in striking out applications made under:

(a) Order 18 r. 19(1)(b) RC (this suit is scandalous, frivolous or vexatious) (para. (b));

(b) Order 18 r. 19(1)(c) RC (the fair trial of this suit may be prejudiced, embarrassed or delayed); and

(c) Order 18 r. 19(1)(d) (para. (d)), O. 92 r. 4 RC and the court's inherent jurisdiction (this suit constitutes an abuse of court process);

(iii) an action can only be struck out in a plain and obvious case, namely where the suit is obviously unsustainable – please see the Supreme Court's judgment delivered by Mohd. Dzaiddin SCJ (as he then was) in *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7; [1993] 3 MLJ 36, at 43; and

(iv) the mere fact that a pleaded case is weak and is not likely to succeed, is not a ground to strike out that pleading – *Bandar Builder Sdn Bhd*, at p. 44.

Does SOC Disclose Reasonable Cause Of Action Against Fifth Defendant?

[21] Firstly, the SOC essentially concerns the use of part of the land by the temple. More importantly, the SOC does not allege that the plaintiffs' fundamental liberty of religion has been infringed in this case. Accordingly, I find that this suit does not concern any constitutional right under art. 11(1) and (3)(a) to (c) of the Constitution. I reproduce below art. 11(1) and (3) of the Constitution:

Freedom of religion

11(1) Every person has the right to profess and practise his religion and, subject to Clause (4), to propagate it.

…

(3) Every religious group has the right:

(a) to manage its own religious affairs;

(b) to establish and maintain institutions for religious or charitable purposes; and

(c) to acquire and own property and hold and administer it in accordance with law. (emphasis added).

[22] It is to be noted that art. 11(3)(c) of the Constitution has expressly provided that every religious group, including the management body in this case, has the constitutional right "to acquire and own property and hold and administer it in accordance with law". In other words, the management body can only acquire proprietary rights in the land in accordance with the NLC. Furthermore, NLC is intended by Parliament to be a code of law which is comprehensive – please see the Court of Appeal's judgment given by Gopal Sri Ram JCA (as he then was) in *Ibrahim Ismail & Anor v. Hasnah Puteh Imat & Anor And Another Appeal* [2004] 1 CLJ 797, at 805-806.

[23] In this case, the fifth defendant is the registered owner of the land and has rights under ss. 92(1), (2)(a) to (d) and 340(1) NLC. The relevant parts of ss. 92 and 340 NLC are reproduced below:

Indefeasibility of final title, and rights of dealing etc

s. 92(1) The alienation of State land to any person or body under final title shall confer on that person or body a title to the land which shall be indefeasible as provided in Part Twenty.

(2) The rights exercisable by any person or body to whom State land has been alienated under final title shall include the following:

(a) the right (subject to the provisions of this Act and to any restriction in interest to which the land is for the time being subject) to sub-divide or partition the land, or amalgamate it with other land, in accordance with the provisions of Chapters 1 to 3 of Part Nine;

(b) the right (subject as aforesaid) to sub-divide any building thereon in accordance with the provisions of Chapter 4 of Part Nine;

(c) the right (subject as aforesaid) to effect transfers, leases, charges, surrenders, and any other dealings permitted under Division IV; …

Registration to confer indefeasible title or interest, except in certain circumstances

s. 340(1) *The title* or interest *of any person or body for the time being registered as proprietor of any land*, or in whose name any lease, charge or easement *is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.*

(2) *The title* or interest *of any such person or body shall not be indefeasible:*

(a) *in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or*

(b) *where registration was obtained by forgery, or by means of an insufficient or void instrument; or*

(c) *where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law. (emphasis added).*

[24] In this suit, the SOC did not allege any of the vitiating circumstances in s. 340(2)(a), (b) and (c) NLC which will render defeasible the fifth defendant's registered title to the land (fifth defendant's registered title). Accordingly, the SOC does not disclose any reasonable cause of action against the fifth defendant regarding the land within the meaning of para. (a).

[25] Section 341 NLC provides as follows:

Adverse possession not to extinguish titles or interests

s 341 *Adverse possession of land for any length of time whatsoever shall not constitute a bar to the bringing of any action for the recovery thereof by the proprietor* or any person or body entitled to an interest therein, *and accordingly, the Limitation Act 1953, shall in no circumstances operate to extinguish any title to, or interest in, land.* (emphasis added).

Section 341 NLC has been applied by Raja Azlan Shah CJ (Malaya) (as His Majesty then was) in the Federal Court in *Sidek Hj Muhamad & Ors v. The Government of the State of Perak & Ors* [1982] CLJ 244; [1982] CLJ (Rep) 321; [1982] 1 MLJ 313, at 314. It is clear that by reason of s. 341 NLC, the management body, the plaintiffs and any of the devotees cannot acquire any proprietary right in the land solely by reason of their occupation of the land.

[26] The plaintiffs cannot rely on the alleged State EXCO's decision because the fifth defendant's registered title is conclusive under s. 89(a) NLC. Section 89(a) NLC provides as follows:

> *Conclusiveness of register documents of title*
>
> *89. Every register document of title duly registered under this Chapter shall, subject to the provisions of this Act, be conclusive evidence:*
>
> *(a) that title to the land described therein is vested in the person or body for the time being named therein as proprietor; …* (emphasis added).

[27] I cannot accept the averments in the SOC regarding fraud, illegality, impropriety and alleged conspiracy against the fifth defendant because the fifth defendant is entitled to exercise any one or all of the statutory rights regarding the land as conferred by ss. 92(1), (2)(a) to (d) and 340(1) NLC.

[28] I have not overlooked s. 44 EA which reads as follows:

> *Fraud or collusion in obtaining judgment or incompetency of court may be proved*
>
> *s 44 Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under section 40, 41 or 42, and which has been proved by the adverse party, was delivered by a court not competent to deliver it or was obtained by fraud or collusion.* (emphasis added).

Section 44 EA does not concern land, let alone proprietary rights in land. Hence, s 44 EA does not confer any right on the plaintiffs to render defeasible the fifth defendant's registered title. In other words, the plaintiffs cannot rely on s. 44 EA as a cause of action to impugn the fifth defendant's registered title.

[29] I am constrained to reject any reliance on Hindu customs at the expense of the NLC. The definition of "law" in art. 160(2) of the Constitution states as follows:

> *"law" includes* written law, the common law in so far as it is in operation in the Federation or any part thereof, and *any custom or usage having the force of law in the Federation or any part thereof*,
>
> (emphasis added).

According to the above definition of law", a custom or usage can only be enforced if it can be shown that the custom or usage has the "force of law". There is no proof that Hindu custom has the force of law in this case. In any

event, any custom or usage cannot override the codified provisions of NLC regarding the rights of a registered proprietor of land which are guaranteed under art. 13(1) of the Constitution.

[30] In *WTWT Sdn Bhd v. Chew Bros (Malaysia) Sdn Bhd & Ors* [2015] 2 CLJ 426, at para. 46, I have expressed the view that the doctrine of legitimate expectation has no application in the realm of private law:

> 46. As explained above, the Plaintiff cannot rely on the invalid 3rd Defendant's 1st Offer by way of the Plaintiff's Letter dated 4.3.2013 to raise any "legitimate expectation" in the Plaintiff's favour. *In Universal Trustee (M) Bhd v. Lambang Pertama Sdn Bhd & Anor [2014] 5 AMR 57, at 82, I have expressed doubt on whether a public law concept of "legitimate expectation" can apply in the context of "private law" disputes:*
>
> > 65. *Public law has recognised the concept of legitimate expectations. Having said that, such a concept is not applicable in the realm of private law which is governed by contracts and Common Law duty of care (not raised in the Counterclaim). It is clear that the Defendants could not rely on the Alleged Legitimate Expectations as a legal concept in this case, much less to sustain the Counterclaim.* (emphasis added).

I am not aware of any Malaysian case which has applied the public law concept of legitimate expectation to restrict, defeat or render defeasible the registered title of a proprietor of land.

[31] Regarding the plaintiffs' allegation in the SOC that the fifth defendant has breached the consent judgment (11 March 2014), it is up to the parties to the consent judgment (11 March 2014) (not the plaintiffs in this suit) to apply for committal proceedings in the court which pronounced the consent judgment (11 March 2014).

[32] Premised on the above reasons, it is plain and obvious that the SOC does not disclose any reasonable cause of action against the fifth defendant within the meaning of para. (a). On this ground alone, encl. 20 should be allowed with costs.

[33] In the Federal Court case of *Yeng Hing Enterprise Sdn Bhd v. Liow Su Fah* [1979] 1 LNS 130; [1979] 2 MLJ 240, at 244, Abdoolcader J (as he then was) held that when a plaintiff has no cause of action against a defendant, the plaintiff's suit is therefore vexatious, frivolous and constitutes an abuse of court process. Based on *Yeng Hing Enterprise*, as the SOC in this suit does not disclose any reasonable cause of action against the fifth defendant, I strike out this suit on the following grounds too:

(i) Paragraph (b) – this suit is frivolous and/or vexatious as against the fifth defendant; and/or

(ii) Paragraph (d), O. 92 r. 4 RC and the court's inherent jurisdiction – this suit constitutes an abuse of court process against the fifth defendant.

A **Do Plaintiffs Have *Locus Standi* To File This Suit?**

[34] When a plaintiff has no right to file a suit, the suit can be struck out under para. (b) (the action is frivolous and/or vexatious), para. (d), O. 92 r. 4 RC and the court's inherent jurisdiction (the suit is an abuse of court process) – please see *Kapten Lam Chee Keong & Ors v. Malaysian Airline System Bhd* [2015] 4 CLJ 1089, at paras. 30, 31 and 35.

[35] The management body is registered as a "society" under s. 7(1) of the Societies Act 1966 (SA). Section 2 SA has given a wide definition of "society" to include "any club, company, partnership, or association of seven or more persons whatever its nature or object, whether temporary or permanent".

[36] Section 9(c) SA provides as follows:

> Provisions applicable to registered societies
>
> 9. The following provisions shall apply to registered societies:
>
> …
>
> (c) *a society may sue* or be sued *in the name of such one of its members as shall be declared to the Registrar and registered by him as the public officer of the society for that purpose,* and, if no such person is registered, it shall be competent for any person having a claim or demand against the society to sue the society in the name of any office-bearer of the society; … (emphasis added).

[37] The filing of this suit by the plaintiffs did not comply with s. 9(c) SA. I am of the view that s. 9(c) SA is a mandatory provision because the Legislature has employed the use of the mandatory term "shall" in the opening sentence of s. 9 SA. If s 9(c) SA is not mandatory, this will open the floodgates of litigation to any member of any registered society to sue on behalf of the registered society on any matter regarding the registered society. Such an interpretation is also contrary to good governance on the part of registered societies, namely any action to be filed by a registered society should be instituted in the name of the public officer declared to the ROS and is registered with the ROS for the purpose regarding suits under s. 9(c) SA (presumably after the registered society's office-bearers have duly considered such a proposed suit). As this suit has breached s. 9(c) SA, on this ground, the three applications should be allowed with costs.

Is This Suit Barred By *Res Judicata* Doctrine?

[38] In Shah Alam High Court Suit No. MT1-22-491-2001 (2001 Suit), on 25 July 2014, Wan Arfah binti Wan Ibrahim J has decided after a trial the following, among others:

(i) a declaration that since around 2001, the defendants in the 2001 Suit (defendants (2001 Suit)) had unlawfully occupied and managed the temple; and

(ii) a mandatory injunction to compel the defendants (2001 Suit), their agents and servants to hand over possession of the temple forthwith to the first defendant (suing as a public officer for the management body in the 2001 Suit)

(decision (2001 Suit)).

[39] The defendants (2001 Suit) did not appeal to the Court of Appeal against the decision (2001 Suit). Hence, the decision (2001 Suit) is final.

[40] In the Supreme Court case of *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783; [1995] 3 MLJ 189, at 197-198, 198 and 199-200, Peh Swee Chin FCJ explained that the doctrine of *res judicata* consisted of the following two limbs:

(i) cause of action estoppel applies to bar a party from filing an action based on a cause of action which has been decided in an earlier suit concerning the party and/or his or her "privy"; and

(ii) issue estoppel operates to prevent a party from raising any issue in any second and subsequent proceedings which:

(a) has been raised; or

(b) can be raised

– in the first proceedings between the parties and/or their privies.

[41] In *Doretti Resources Sdn Bhd v. Fitters Marketing Sdn Bhd & Ors* [2017] 1 LNS 738; [2017] 5 MLRH 1, at para. 15, I have followed Megarry VC's decision in the English High Court case of *Gleeson v. J. Wippell & Co Ltd* [1977] 1 WLR 510, at 514, that a person is a "privy" of another person if there is a relationship between those persons by blood, title or interest. The decision in *Doretti Resources* has been affirmed by the Court of Appeal.

[42] There is a privity between the plaintiffs and the defendants (2001 Suit) because all these parties have a common interest in the occupation and use of the temple.

[43] I accept the contention by the fifth defendant that the defendants (2001 Suit), by themselves or their privies, have filed a series of suits to, among others, set aside the consent judgment (11 March 2014) – please see paras. 20-42 of the fifth defendant's written submission.

[44] Based on the reasons submitted by the second and fifth defendants, I accept that this suit has been filed by the privies of the defendants (2001 Suit). Accordingly, this suit is barred by both limbs of the *res judicata* doctrine. To allow this suit to proceed is not only an abuse of court process but is contumelious in the sense of allowing the defendants (2001 Suit) and their

privies to continue to breach the consent judgment (11 March 2014) and the decision (2001 Suit) (continuous breach of two court orders). Accordingly, the three applications are allowed with costs.

Whether Seventh Plaintiff Can File This Suit

[45] In Shah Alam High Court Originating Summons No. BA-24NCvC-313-08-2017, on 16 March 2018, Azimah Omar J has ordered as follows, among others:

(i) a declaration that, among others, the seventh plaintiff is a vexatious litigant regarding the consent judgment (11 March 2014) and matters regarding the management body and the temple; and

(ii) the seventh plaintiff is restrained from instituting any proceedings regarding, among others, the consent judgment (11 March 2014) without prior leave of a High Court Judge

(2018 order).

There is no appeal to the Court of Appeal against the 2018 Order.

[46] Despite the 2018 Order, the seventh plaintiff has the temerity to file this suit!

Enclosure 4

[47] As the plaintiffs have no cause of action against the fifth defendant (please see the above Part I), encl. 4 is dismissed with costs on this ground alone. I rely on the Supreme Court's judgment delivered by Hashim Yeop Sani CJ (Malaya) in *Khoo Soo Teong v. Khoo Siew Ghim & Anor* [1991] 3 CLJ 2063; [1991] 1 CLJ (Rep) 212; [1991] 3 MLJ 158, at 159.

[48] Additionally, I exercise my discretion to dismiss encl. 4 on the following grounds:

(i) the plaintiffs do not have *locus standi* under s. 9(c) SA to institute this suit – please see the above Part J;

(ii) this suit is barred by both limbs of *res judicata* doctrine – please refer see the above Part K; and

(iii) to grant an order in terms of encl. 4 is to allow the continuous breach of two court orders. Furthermore, the seventh plaintiff is guilty of breaching the 2018 Order.

Court's Decision

[49] In summary:

(i) Enclosure 52 is dismissed with costs to the second defendant;

(ii) the three applications are allowed with three sets of costs to the:

(a) second defendant;

(b) third and fourth defendants; and

(c) fifth defendant;

(iii) Enclosure 4 is dismissed with costs to the fifth defendant; and

(iv) based on the plaintiffs' undertaking:

(a) an order for the Court Registrar to assess damages regarding all losses suffered by the fifth defendant (damages) arising from the fifth defendant's undertaking (assessment);

(b) an order for the plaintiffs to pay the damages to the fifth defendant;

(c) the plaintiffs shall pay interest at the rate of 5% per annum on the amount of damages to the fifth defendant from the date of the assessment until the date of full payment of the damages; and

(d) costs of the assessment shall be assessed by the Court Registrar and shall be paid by the plaintiffs to the fifth defendant.

[50] I now invite all learned counsel to submit regarding costs, especially on whether the court should exercise its discretion under O. 59 r. 16(4) RC to order the seventh plaintiff to bear costs on an indemnity basis.

[51] In closing, I thank all learned counsel for their able assistance in this case, without which this judgment is not possible.